

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SENSITECH INC. AND DONALD W.
BERRIAN

Plaintiff,

v.

TIME & TEMPERATURE COMPANY,
d/b/a TIME 'N TEMPERATURE
CORPORATION

Defendant.

Civil Action No. 04-11483 (MLW)

**DECLARATION OF DAVID B. SANDELANDS IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR A MORE
DEFINITE STATEMENT**

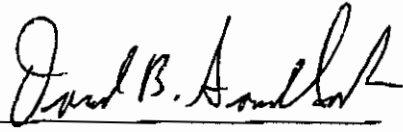
I, David B. Sandelands, declare:

1. I am an attorney admitted to practice before all of the courts in the State of California. I am an associate of the law firm of Cislo & Thomas, LLP ("Cislo & Thomas"), counsel of record for defendant Time 'N Temperature Corporation ("TNT"). I have personal knowledge of the facts stated herein. If called upon to testify as a witness I could and would competently do so as set forth below.

2. Attached to this declaration as Exhibit "A" is a true and correct copy of the Record Transcript of the April 28, 2005 hearing on TNT's Motion To Dismiss Or In The Alternative To Transfer Venue.

3. For the Court's convenience, attached to this declaration as Exhibit "B" are true and correct copies of the relevant pages of the Record Transcript of the April 28, 2005 hearing on TNT's Motion To Dismiss Or In The Alternative Transfer Venue which are cited to in the foregoing memorandum.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 6 day of June, 2005, at Santa Monica, California.

By: 
David B. Sandelands, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SENSITECH, INCORPORATED) CA 04-11483
and DONALD BERRIAN) Boston, MA
v.) April 28, 2005
)
TIME & TEMPERATURE COMPANY)

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE
MOTION HEARING

APPEARANCES:

Day, Berry & Howard
by JOHN GUTKOSKI, ESQ., MATTHEW BECKER, ESQ., and
ALEX FENNELL, ATTY.,
for Plaintiffs.

Cesari and McKenna
by THOMAS O'KONSKI, ESQ., and
Cislo & Thomas
by DANIEL CISLO, ESQ.,
for Defendant.

JUDITH A. TWOMEY, RPR
Official Court Reporter
One Courthouse Way
Courtroom 10~Room 5200
Boston, MA 02210
(617)946-2577

1 THE CLERK: This is Civil Action Number
2 04-11483, Sensitech, Incorporated versus Time &
3 Temperature Company.

4 Court is in session. You may be seated.

5 THE COURT: Good afternoon. Would counsel
6 please identify themselves for the court and for the
7 record.

8 MR. GUTKOSKI: Certainly, your Honor. Good
9 afternoon. John Gutkoski of Day, Berry & Howard here in
10 Boston on behalf of the plaintiffs, Sensitech and Donald
11 Berrian.

12 MR. BECKER: Your Honor, Matthew Becker of Day,
13 Berry & Howard in Hartford, Connecticut, also for the
14 plaintiffs, Sensitech and Donald Berrian.

15 MS. FENNELL: Your Honor, Alex Fennell of Day,
16 Berry & Howard, Boston, also for the plaintiffs.

17 MR. O'KONSKI: For the defendant, Time &
18 Temperature, Thomas O'Konski from Cesari and McKenna in
19 Boston, representing the defendant. And with me is
20 Daniel Cislo from Cislo & Thomas in Santa Monica,
21 California. Mr. Cislo is admitted pro hac vice.

22 THE COURT: Okay. I apologize for the delay in
23 starting. Something came up.

24 We're here today on the defendant's motion to
25 dismiss or, alternatively, if that fails, to transfer the

1 case to the Central District of California.

2 I've studied the matters and, consistent with my
3 usual practice, it's going to be my goal to decide the
4 motions orally this afternoon.

5 There's one piece of information or type of
6 information I didn't discern that I'm particularly
7 interested in.

8 The defendant lists a number of third party
9 witnesses, I think, in paragraph 26 of the Poll
10 affidavit, but I'm not told anything about what they are
11 expected to say and why they might be important.

12 And, similarly, the plaintiff mentions third
13 party witnesses here, including two of the vendors. But
14 I'm not told what they might say or why they might be
15 important.

16 So I'd permit you to give me some oral
17 information on that.

18 But my present tentative view is under the very
19 liberal standards articulated by the Federal Circuit,
20 there appears to be personal jurisdiction at this point
21 because you've got a conflict in your affidavits. The
22 plaintiffs say, essentially, you've got five people who
23 receive produce in Massachusetts who require or authorize
24 the use of the defendant's device. The defendant seems
25 to say there's only one. But if I understand the

1 standard right, I'd have to treat it as if it really is
2 five for present purposes, although it seems to me that
3 personal jurisdiction is a sufficiently close question
4 and, if the case is not dismissed and stays here, whether
5 there should be phased discovery and summary judgment on
6 that issue is a question to be addressed.

7 But I do at the moment tend to think that
8 there's barely enough to, for present purposes, establish
9 personal jurisdiction. In part because it is such a
10 close question and in part for other reasons, I'm willing
11 to seriously consider the transfer. I know that
12 frequently -- well, I know that the plaintiffs' choice of
13 forum deserves some weight, but that weight varies in the
14 circumstances.

15 I frankly wonder what this case is really about.
16 I don't think I've ever seen a more sparse complaint. I
17 have concerns about whether it satisfies the requirements
18 of notice pleading. If I've read it right, it doesn't
19 allege what the infringing devices are or what ways in
20 which they infringe.

21 And my sense is that the relative resources of
22 the parties are different, and I'm concerned that it
23 might be most fair and efficient if this case is going to
24 proceed to have it proceed in California rather than
25 disappear on personal jurisdiction on summary judgment.

1 But those are just tentative views.

2 It's the defendant's pair of motions.

3 As I said, with regard to the transfer issue,
4 particularly the importance of -- well, who the third
5 party witnesses are and what they would say is important
6 to the analysis.

7 Why don't I let defense counsel go first.

8 MR. CISLO: Thank you, your Honor. I would
9 like to address some of these third party witnesses. In
10 particular, the main issue here which is raised by the
11 plaintiffs' complaint is whether or not there is
12 infringement. And to do that, a number of witnesses
13 would be testifying, such as the design engineer, Robert
14 Schulkin (sic), in terms of what is the make up of this
15 component with this product, how does it operate. And
16 with regard to Mary Schulkin, what parts of her component
17 actually go into the unit and how does it get assembled
18 and work, because the plaintiff will say, here are the
19 elements of our patent, and here is their function and
20 how does this work. In addition, there will be claims as
21 to what this product actually does and how it operates,
22 and that has to do with a lot of the Web site design and
23 advertising --

24 THE COURT: Actually, two things. First, pull
25 that microphone in front of you, because I'm having

1 trouble hearing you.

2 MR. CISLO: Sorry, your Honor.

3 THE COURT: Who is the design engineer?

4 MR. CISLO: The design engineer is Robert
5 Schulkin that's listed as one of our third party
6 witnesses. And also the parts procurement person, Mary
7 Schulkin. Both of them are residents of California.

8 THE COURT: And they don't work for TNT?

9 MR. CISLO: They do not, your Honor.

10 THE COURT: Go ahead.

11 MR. CISLO: The other issue is, of course, we
12 have Richard Spidel (sic), former sales manager, lives in
13 Montana; Harold Mayer, listed by the defendant in
14 advertising; Clint Osterlander (sic); these are all
15 people that will testify as to how the company describes
16 their unit and how it operates. That will probably come
17 up as the other side will say, well, can you describe
18 your unit to operate a certain way publicly and now
19 you're saying it operates a different way. So that will
20 all come up as to the description of the product, how it
21 operates, because their patent has to do with not only
22 componentry, but how that componentry actually operates.
23 We contend that there's no way in the world our
24 componentry could infringe, and we also note that this
25 was a patent that was filed and issued long ago, reissued

1 recently -- or not recently, several years ago, and only
2 now brought up as something that is infringed following
3 on the heels of this discussion about buying the company.
4 And we do note that the declarations of Budd Pohle go
5 unrebutted by Mr. Schultz, the CEO of the plaintiff
6 company, with regard to what actually transpired, the
7 fact that they wanted to buy his company out. He refused
8 because the price was too low. And then they instituted
9 these proceedings, just like they had done in other cases
10 with other competitors, so that now Sensitech has roughly
11 90 percent of the marketplace, and our client, a small
12 81-year old guy who started the business in 1972 as an
13 inventor, owner, majority shareholder of the company,
14 with a few employees -- he's the only management person
15 besides one other person -- you know, trying to, you
16 know, compete against what's going on.

17 THE COURT: And that's one of the reasons that
18 despite the deference generally given to the plaintiff's
19 choice of forum I'm thinking seriously about transferring
20 the case.

21 MR. CISLO: And the interest of justice is one
22 of the factors that the court can look at on that point,
23 particularly since our client is 81 years old. He's had
24 four bypass surgeries. I do note that the disposition
25 time in this court -- I thought California was bad at 16

1 months -- but, apparently, in this jurisdiction, it's 30
2 months from filing the complaint to disposition. That's
3 pretty critical when you're an 81-year old person who
4 needs to have something resolved, in addition to the case
5 that's pending in California, which is a verified
6 complaint for federal and state antitrust claims, unfair
7 competition, as well as the declaratory judgment claim of
8 what's being claimed here, which that case will go on, no
9 matter what. Although there is a pending motion to
10 transfer, they have answered that complaint already. We
11 think that if this court transfers the case to
12 California, everything will be disposed of in one place,
13 especially a place they already have operations, they
14 have people. They have an office there very close to
15 where the court is, relatively speaking.

16 THE COURT: Couple of hundred miles.

17 MR. CISLO: Well, compared to 3,000 miles, I
18 guess, that's a matter of degree.

19 THE COURT: Do I remember right, they actually
20 have more than one office in California, but there's only
21 one in the Central District.

22 MR. CISLO: That's my understanding, your
23 Honor.

24 So these are all factors that this court can
25 consider in terms of transfer. But one other thing I'd

1 like to point out on the personal jurisdiction side. I
2 tried, in preparing for this argument, I tried to not
3 look at some of the attorney arguments, just look at the
4 declarations and say, okay, what do these declarations
5 say? And I see that everything Budd Pohle has said is
6 unrebutted, for the most part, and I see everything that
7 the plaintiff has offered is all on information and
8 belief, and there is not one single unit that can be
9 pointed that was sold in Massachusetts.

10 THE COURT: I thought you conceded you sell
11 about a hundred a year.

12 MR. CISLO: Your Honor, there is a big
13 difference because, see, they're sold in California, but
14 California Growers Shipper, that's our customer. We sell
15 to Grower Shippers. They sell to the grocer, who's the
16 buyer. That's the disconnect, because they think that
17 we're operating a business model like theirs. But that's
18 the contrary. What happens is we sell to California
19 Shipper Growers. Those units then go from various parts
20 of the country. And the units that could have, may have
21 ended up in Massachusetts get returned from
22 Massachusetts, but they could well have been shipped to
23 Connecticut or New Jersey and simply returned. So there
24 is no selling of the unit in Massachusetts.

25 THE COURT: But don't you -- doesn't the

1 evidence, including, I think, a fax from TNT, indicate
2 that you target people who buy produce in Massachusetts
3 and ask them to require or authorize the use of your
4 product by the shippers?

5 MR. CISLO: That is not true in the sense on
6 the evidence before us, because the declarations on
7 information and belief says that our company has sent out
8 these fax blasts, but there's no evidence to suggest that
9 they've gone to Massachusetts or that anybody has acted
10 on them. Plus, the list that they produced from somebody
11 else's Web site lists a whole bunch of other different
12 temperature devices that can be used. So just being on
13 someone's list of acceptable devices doesn't make for a
14 sale. And this is quite different from the Beverly Hills
15 Fan Company case where there's a stream of commerce
16 theory that you take the product and you put it in the
17 stream of commerce expecting it to be sold in, let's say,
18 Massachusetts. That wasn't the case at all. It was sold
19 and was sold in California. And if by happenstance it
20 was returned from Massachusetts, that would not trigger
21 an act of infringement, because there's not offer for
22 sale or anything that would trigger an infringement.

23 So based upon the limited specific
24 jurisdictional principles, there hasn't been an act of
25 infringement that our client has perpetrated in

1 Massachusetts.

2 THE COURT: Hold on just a minute.

3 (Short pause.)

4 THE COURT: What I'm looking at is the David
5 Vaught declaration. There's an attachment, exhibit A.
6 It appears to have been faxed by Smart Check. That's
7 your product, right?

8 MR. CISLO: That's correct, your Honor.

9 THE COURT: It says: Check this list for your
10 customers who request Smart Check digital recordings, and
11 you've got Alphas Chelsea; Big Y Foods, Massachusetts;
12 Azoto's (sic), Massachusetts; C & S Wholesale,
13 Massachusetts; Community Suffolk, Massachusetts; Shaw's
14 Supermarkets, I don't know if that's --

15 MR. CISLO: And here's the big distinction.
16 These are people who have said that our Digital recorder
17 is good. That's all that they've said, that they would
18 accept produce that came to them if it had that type of
19 digital recorder, among other recorders. So it's not
20 like there's a special deal or relationship. There might
21 be five or ten different recorders. Maybe there's only
22 two now because of what's happened in the marketplace.
23 But there is not the actual act of selling to them the
24 unit that's accused of infringement to trigger the
25 specific jurisdiction, your Honor.

1 THE COURT: But even offering something for sale
2 can be infringement.

3 MR. CISLO: If it's actually being offered for
4 sale to that party and specifically targeted. But, for
5 example, having a passive Web site, like our client has,
6 it's found in many jurisdictions not to be the type of
7 offer for sale that would trigger a specific jurisdiction
8 in Massachusetts.

9 And like I said, if you read the declaration
10 that supports this exhibit, again, it is -- there is no
11 proof that any of these people that are listed as being
12 Massachusetts entities actually bought any of these
13 units. In fact, it's all information and belief, what's
14 my speculation. There is nothing to suggest that (sic)
15 failed to produce one person, one invoice in
16 Massachusetts that says this unit was purchased by this
17 company in Massachusetts after being ordered from our
18 client in California.

19 So even on the personal jurisdiction what I'm
20 saying is that there shouldn't be personal jurisdiction
21 under these circumstances because it's a weird scenario,
22 I understand. If we had that kind of business volume
23 that they had and we were selling (sic), there would be
24 personal jurisdiction, and we'd have to concede that.
25 But that's not the case here.

1 But what I'd like to focus on is the lesser
2 burden standard I have is on the transfer action, because
3 I think that's where the parties are going to get
4 judicial economy. The jurisdictional issue, you know,
5 we're spending a lot of time and effort in. My client
6 wanted to emphasize and thank you very much for having
7 the opportunity to have an oral argument because you know
8 how impended the court is, and it takes a long time to
9 get cases through when you have that many cases that you
10 have; whereas, in California, they're impacted, but they,
11 I guess, have fewer cases and can get through them
12 quicker. And when you're 81 years old, you want this
13 cloud lifted over you. And we think that that won't not
14 happen if we have to spend a lot of time and effort
15 having him go to Massachusetts for trial or anything
16 else. And so we're hoping that on that lesser standard
17 that we have to meet that we can convince the court that
18 there is an action already in California. They've
19 answered it. True, they brought a motion to transfer
20 also. We think that Judge Ray will simply accept the
21 totality of everything if this case gets transferred, and
22 it will in essence lessen the load of Massachusetts
23 courts of one less --

24 THE COURT: Well, I don't think that's a
25 cognizable consideration, although sometimes I get things

1 transferred to me that cause me to think that some of my
2 colleagues around the country have a different view on
3 that.

4 I wrote a decision many years ago, and I think
5 it's still sound, Brant Point versus Patch. I mean, you
6 give deference to the plaintiff's selection of forum, but
7 the weight you give that deference varies in the
8 circumstances. You look at the convenience of the
9 parties. They in many cases appear to cancel each other
10 out. One's from Massachusetts, one's from California.

11 Here, one party may be better able to travel
12 than the other. But a key consideration in my view is
13 the interests of justice. And one interest of justice is
14 a trial court getting access to live witnesses, which may
15 be important to a fair resolution of the case at trial.
16 And some of those witnesses might be accessible in one
17 jurisdiction, not in another. That's why I was asking
18 you about who are these third party witnesses and, to
19 some degree, where do they live. And there are other
20 interests of justice.

21 If I -- I have another case called Dabarts
22 (sic). The first filed case was here. It was a patent
23 case, but I sent it, I think, out to Oregon because I
24 thought it was a race to the courthouse, a kind of forum
25 shopping for tactical reasons. And I didn't want to abet

1 that. And so what you gave me caused me to have
2 questions about whether, you know, this is a serious
3 patent case or whether it's an effort to pummel somebody
4 who wouldn't sell with expensive protracted litigation.
5 And if I have that sense, that will weigh in favor of
6 transfer.

7 MR. CISLO: And those allegations are
8 unrebutted in the papers. In terms of the way I read the
9 declarations, I did not see a declaration from Mr.
10 Schultz, the CEO that had these negotiations.

11 THE COURT: Well, what do you want me to look
12 at?

13 MR. CISLO: In the moving papers, there is a
14 declaration of Budd Pohle and, in particular, he talks
15 about the communications --

16 THE COURT: Are you talking about the first one
17 or the second one?

18 MR. CISLO: The first one, the first
19 declaration.

20 THE COURT: What paragraph?

21 MR. CISLO: In particular, paragraph 12 and 13.
22 And if I can direct the court to paragraph 13 in
23 particular. Mr. Schultz stated: I want you out of the
24 business. That's the breakdown on the negotiations
25 because they wanted to buy out my client with some small

1 amount. And there's also allegations in this declaration
2 too about a similar circumstance having occurred with
3 another distributor. That might be in the other
4 declaration of Budd Pohle that was in the reply.

5 THE COURT: In which declaration?

6 MR. CISLO: The second declaration of Budd
7 Pohle that is submitted in reply.

8 THE COURT: What paragraph?

9 MR. CISLO: I'm sorry, it's in the first
10 declaration, I apologize, your Honor, paragraph 7, where
11 he says that I am informed (unintelligible reading).

12 And what's particularly disturbing is the fact
13 that these negotiations occurred in, I guess, 2001, and
14 they kind of waited to bring the suit, that they knew
15 about the products. Our client's products had been out
16 there a long time. They didn't sue on the original
17 patent; they sued on the reissue patent, which they
18 tweaked to try to, I guess, artably (sic), try to cover
19 our client's products, which is the new and improved, and
20 we have opinion letters of counsel that suggests that
21 there is no infringement whatsoever. I think they only
22 have one claim, which is a means plus function theories
23 of elements, which is very narrow to try to allege that
24 our client's products infringe. I think that's why the
25 complaint is written in such a bare bones fashion,

1 because there is some accountability that will occur if
2 this case isn't settled in terms of making claims about
3 infringement that aren't warranted. So it's safer to
4 make a very broad claim.

5 And so on that basis, your Honor, we think that
6 the interests of justice do serve to have the case
7 transferred. We do believe that there is no personal
8 jurisdiction over the defendant here because of the lack
9 of any sale of the accused device to any Massachusetts
10 residents.

11 THE COURT: Why don't I hear from the plaintiff.

12 MR. GUTKOSKI: Thank you, your Honor.

13 This is a garden variety patent case. The
14 complaint complies with the draft complaint that's
15 provided in the rule book for patent infringement cases.
16 It provides adequate notice to Sensitech. There have
17 been extensive discussions between the parties as to what
18 products are or are not involved. There have been
19 representations by Sensitech in the papers before the
20 court regarding the products that are involved attached
21 to the declarations of Mr. DiRubio, Mr. Vaught, are
22 downloads or screen shots of the Web site of TNT
23 regarding the exact products not only that are accused of
24 infringement here but are the subject of their
25 relationships, their ongoing relationships, their

1 admitted ongoing relationships with supermarket chains
2 here in the Commonwealth of Massachusetts.

3 Your Honor, the plaintiffs believe that personal
4 jurisdiction here is not a close question and is
5 certainly not a close enough question to in any way
6 impact or reduce the deference that should be paid in
7 terms of venue.

8 THE COURT: Let me ask you this. Which exhibits
9 would you particularly point me to with regard to the
10 admitted ongoing relationships with supermarket chains in
11 Massachusetts?

12 MR. GUTKOSKI: In regard to supermarket chains
13 or the products, your Honor, I'm sorry?

14 THE COURT: Well, you just told me that there's
15 evidence of their ongoing relationships, admitted ongoing
16 relationships with supermarket chains here in the
17 Commonwealth. So I want to know --

18 MR. GUTKOSKI: Certainly, your Honor. The
19 declaration of Mr. Pohle, the second one, I believe it's
20 dated -- there are two -- the one dated September 9.
21 Refer you to paragraph 13, to begin with. There, about
22 two-thirds of the way down, Mr. Pohle discusses the
23 ongoing relationship with Alphas Chelsea and notes at
24 least or about a hundred recorders per year.

25 THE COURT: In fact, I had been aware of that